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CASE NO:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PHILLIP BONELLO,

PETITIONER

V.

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

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UNITED STATES OF AMERICA

QUESTION PRESENTED

WHETHER SECTION 2925.03 OF THE OHIO REVISED CODE, WHICH INCORPORATES A MANDATORY ACTUAL INCARCERATION PROVISION, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT PROVIDED IN THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

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OFFICIAL AND UNOFFICIAL REPORTS

No official reports of the opinion in this case have been published. The opinion is published unofficially as State v. Bonello, No. 81 AP-220 (Ct. App. 10th Dis. September 29, 1981).

GROUNDS FOR JURISDICTION

The Tenth District Court of Appeals for the State of Ohio rendered an opinion on the merits of this action on September 29, 1981. On March 9, 1982, the Supreme Court of Ohio rendered a decision overruling the Motion for Leave to Appeal, thereby refusing to accept the action for review. Petitioner respectfully requests review pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

...No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

8TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Excess bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

SECTION 2925.03 OF THE OHIO REVISED CODE (PAGES, 1981)

(A) No person shall knowingly do any of the following:

(6) Possess a controlled substance in an

amount equal to or exceeding three times the bulk amount;

(D) If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates this section is guilty of trafficking in drugs.

(6) Where the offender has violated division (A)(6) of this section, trafficking in drugs is a felony of the third degree and the Court shall impose a sentence of actual incarceration of eighteen months . . . .

STATEMENT OF THE CASE

On October 23, 1979, the Grand Jury in the Court of Common Pleas, Franklin County (Columbus), Ohio, issued a three-count indictment charging the Petitioner, Phillip Bonello, with three counts of alleged violations of Section 2925.03 of the Ohio Revised Code.

On October 28, 1980, with Counts One and Two of the indictment disposed by nolle prosequi, Petitioner entered a no contest plea to a felony of the third degree, a stipulated lesser included offense of Count Three of the indictment, Section 2925.03(A)(6), O.R.C., trafficking in drugs. Upon entry of the no contest plea, the trial court found Petitioner guilty and imposed sentence pursuant to Section 2925.03(D)(5), O.R.C., which mandated actual incarceration of eighteen months. The Court further sentenced Petitioner

for two (2) years to ten (10) years under Section 2929.11(B)(3), O.R.C.

Petitioner, Phillip Bonello, challenged the constitutionality of Section 2925.03(D)(5), O.R.C.; but on December 15, 1980, the trial court overruled Petitioner's Motion. Petitioner specifically objected that this section requiring actual incarceration violated the equal protection clause of the fourteenth amendment, the eighth amendment prohibition against cruel and unusual punishment and the State of Ohio's constitutional provision for separation of powers. The objections are set forth at pages 19, 20 and 21 of the Transcript of Proceedings in the case.

On appeal, Petitioner challenged the constitutionality of Section 2925.03(D)(5) of the Ohio Revised Code. The Court of Appeals of the Tenth District denied all three assignment of errors and affirmed the judgment of the trial court on September 29, 1981. The issue was then raised for review to the Supreme Court of Ohio. The Supreme Court refused to address the issue on the merits and dismissed Petitioner's Motion.

ARGUMENT

Petitioner, Phillip Bonello, submits that the

mandatory actual incarceration provision of Ohio Revised Code §2925.03 violates not only the equal protection clause of the fourteenth amendment, but also the prohibition against cruel and unusual punishment as provided by the eighth amendment.

A. The mandatory actual incarceration provision, §2923.03, O.R.C., is violative of the equal protection clause of the fourteenth amendment in that it arbitrarily and unreasonably violates Petitioner's fundimental rights of due process and liberty. It is imperative that the Court in deliberating on the constitutionality of that statute, balance the interests of the State against the interests of those persons affected by the statutory provision.

The State's interests in enacting the mandatory sentencing provision for actual incarceration must be sufficiently compelling to outweigh the Petitioner's fundamental right to liberty. The penalogical purposes of the legislature in justifying the elimination of discretionary, individualized sentencing are not rationally related to the interests of the State (deterrence and rehabilitation of offenders) and are clearly not of such compelling nature to outweigh the interests of the Petitioner in his liberty.

A statute violates the guaranty of equal protection in either two ways; i.e., it may be arbitrary and discriminatory on its face, or if not violative on its face, applied in a discriminatory manner. Hernandez v. Texas, 347 U.S. 475 (1954). Petitioner was convicted of a third degree felony. Persons convicted of third degree felonies such as Abduction, Section 2905.02(B), O.R.C.; Bribery, Section 2921.02(E), O.R.C.; Arson, Section 2909.03(B), O.R.C.; Gross Sexual Imposition, Section 2907.05(B), O.R.C., are eligible for sentences of between one and three years as prescribed by Sections 2929.11(B)(3), O.R.C. The convicted felons, if given a sentence of two to ten years, are also eligible for parole in as little as four months. Department of Rehabilitation and Corrections Rules Ch. 5120: 1-1-03(2). Defendant, on the other hand, was given a sentence of two to ten years. He will not be eligible for release from prison until at least 18 months of actual incarceration have been served.

It is inherently unequal to allow persons convicted of such heineous crimes of violence as arson, abduction and third degree felons the possibility of parole before their minimum sentence has been served and not allow Petitioner and others convicted of pos-

session of a large amount of illegal narcotics under Section 2925.03, O.R.C., the same treatment. Those who are convicted pursuant to Section 2925.03 are also denied the opportunity to have the sentencing judge consider personal and mitigating factors, which other third degree felons have the opportunity to present for such consideration. This inequality of treatment bears no ascertainable compelling relation to the seriousness of the offense and thereby violates the guaranty of just and equal law contained in the Constitution of the United States.

B. The legislature's provision for mandatory sentencing of persons convicted under Section 2923.03 O.R.C. to actual incarceration results in cruel and unusual punishment and is, thus, violative of the proscription of the eighth amendment. It bears no rational relationship to a permissible legislative purpose.

This Court in Gregg v. Georgia, 428 U.S. 153 (1976), held that a punishment was excessive and unconstitutional, if it (1) makes no measurable contribution to acceptable goals or punishment; or (2) is grossly out of proportion with the severity of the crime. A punishment may fail the test on either

ground. Id.

One recognized major goal of punishment is rehabilitation. The Petitioner's mandatory punishment per Revised Code 2925.03(D)(6) is disproportionate to a rational legislative purpose for rehabilitation of criminals. If Petitioner were sentenced to a jail sentence of two to ten years with the possibility of parole after four months, he would have viable incentive to rehabilitate himself rather as compared to a sentence of actual incarceration of at least 18 months. Therefore, Section 2925.03(D)(6) must fail the first test as prescribed in Gregg.

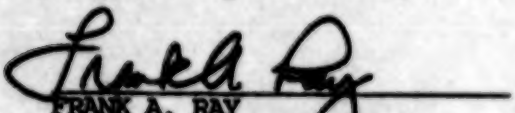
Not only does the statute make no measurable contribution to acceptable goals of punishment, but it is also grossly disproportionate with the severity of the crime. Clearly, a disparity of constitutional dimensions exists between the sentence imposed and the evil to be avoided. Mandatory sentencing to actual incarceration is "unusual" punishment in that it unfairly segregates a class of criminals and imposes upon them a penalty which is grossly disproportionate to the severity of the crime. In being convicted of a third degree felony involving narcotics, Petitioner was subjected to a punishment that an arsonist or a

person convicted of bribery would not be subjected to. Arson, a crime of violence, does not receive the strict punishment of a narcotics offender. Thus, the gross disparity between the sentence proscribed by law and the evil of which it is aimed make Section 2925.03, O.R.C. cruel and unusual punishment. This statute violates the eighth amendment of the Constitution of the United States.

SUMMARY

Application of the manadatory actual incarceration provision of Section 2925.05(D)(6) is patently violative of the equal protection clause and the prohibition against cruel and unusual punishment. Full review by this Honorable Court so as to prevent further violations of constitutional rights would benefit greatly all involved in the criminal justice system of Ohio and other states which might adopt or have adopted a mandatory actual incarceration provision for criminal sentencing.

Respectfully submitted,



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IN THE COURT OF APPEALS OF

FRANKLIN COUNTY, OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

V. : CASE No. 81AP-220

PHILLIP BONELLO, :

Defendant-Appellant. :

D E C I S I O N

Rendered on September 29, 1981

MR. MICHAEL MILLER, Prosecuting Attorney,
MS. KAREN L. MARTIN, Assistant,
Franklin County Hall of Justice,
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Columbus, Ohio,
For Plaintiff-Appellee

MICHAEL P. COLLEY CO., L.P.A.,
MR. FRANK A. RAY and
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536 South High Street,
Columbus, Ohio,
For Defendant-Appellant.

McCORMAC, J.

Defendant was indicted for three counts of aggravated trafficking of LSD and marijuana, alleged to be selling or offering to sell these controlled substances in an amount equal to or exceeding three times the bulk

amount. The charges were first degree felonies calling for actual incarceration of at least seven years. Defendant waived trial to a jury and entered a no contest plea to a lesser included charge of possessing LSD, a controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount. That offense constituted a felony of the third degree requiring imposition of a sentence of actual incarceration of 18 months. Defendant was found guilty of the charge. The other charges were nolle prosequi and he was sentenced to two to ten years with actual incarceration of 18 months to be served. The trial court overruled defendant's motion challenging the constitutionality of the actual incarceration provision of R. C. 2925.03.

Defendant has appealed, asserting the following assignments of error:

> "1. The trial court erred in finding the principal of actual incarceration in Section 2925.03 O.R.C. does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.
>
> "2. The trial court erred in finding that the imposition of a mandatory sentence of actual incarceration under Section 2925.03 O.R.C. does not violate the Eighth Amendment of the United States Constitution.
>
> "3. The trial court erred in finding that the

mandatory requirement of actual incarceration does not violate the constitutional requirement of separation of powers."

The facts related by the state at the no contest plea hearing indicated that defendant offered to sell a police officer and an informant 800 "hits" of LSD as well as marijuana. Defendant was arrested in a vehicle which contained 11,200 "hits of acid." According to information related by the state to the court, Bonello was the person who had transported and was selling the LSD.

Defendant did not contest those facts but made a plea for leniency on the basis that Bonello had a Bachelor of Arts degree from Ohio University, a Master of Arts degree from Duquesne University and was currently pursuing a PhD degree at the Illinois Institute of Technology and that he has no prior record.

Defendant first argues that the mandatory sentencing provision of R. C. 2925.03 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because there are not mandatory sentencing provisions for persons convicted of other third degree felonies such as abduction, bribery, arson, or gross sexual imposition. That contention is not well taken. The legislature has inherent power to

create classifications if such classifications are reasonable and some legitimate state interest is advanced. See State v. Martin (1958), 168 Ohio St. 37; McGinnis v. Royster (1973), 410 U.S. 263. An exercise of the police powers is valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. Benjamin v. Columbus (1957), 167 Ohio St. 103. The question of whether the exercise of the police power is unreasonable or arbitrary is committed in the first instance to the legislature and the courts will not invalidate such legislative decisions unless they are clearly erroneous. Benjamin v. Columbus, supra, syllabus 6. The burden is upon the party attacking the legislative classification to demonstrate that it is erroneous and to negate every conceivable basis which might support it. Madden v. Kentucky (1940), 309 U.S. 83.

There was a reasonable basis for the legislature to segregate drug trafficking from other third degree felonies and to impose a provision for actual incarceration of certain drug law offenders. As the United States Supreme Court has stated, "the comparative gravity of criminal offenses and whether their conse-

quences are more or less injurious are matters for the state itself to determine." Collins v. Johnston (1915), 237 U.S. 502. The General Assembly's conclusion that drug trafficking offenses are serious enough to merit the sanction of a period of actual incarceration was a valid exercise of the legislature's power to classify offenses and assign penalties.

Defendant's first assignment of error is overruled.

Defendant secondly contends that the actual incarceration provided by R. C. 2925.03(D)(5) constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. That contention is frivolous as applied to this defendant.

The Eighth Amendment prohibits only punishment grossly disproportionate to the severity of the crime. Ingraham v. Wright (1977), 97 S. Ct. 1401. It is generally accepted that punishments prohibited by the Eighth Amendment are limited to torture or other barbarous or degrading punishments unknown at common law and punishments which are so disproportionate to the offense as to shock the moral sense of the community. McDougle v. Maxwell (1964), 1 Ohio St. 2d 68. Long

terms of imprisonment in drug offense cases have been upheld for much less aggravated offenses than in the instance case. See State v. Chaffin (1972), 30 Ohio St. 2d 13, where a sentence of 20 to 40 years for the sale of marijuana was upheld.

In this case, defendant, a highly educated person, apparently capable of finding productive employment was selling LSD, a very dangerous drug, in large quantities, with apparently no concern about the havoc that he had to know that it would inflict upon the lives of users and their families. There is nothing in the record to indicate that defendant had any remorse about his activities at all. His motive was apparently profit. If the sentence imposed upon defendant was disproportionate, it was disproportionate on the low rather than the high side.

Defendant's second assignment of error is overruled.

Defendant finally contends that the General Assembly has violated the constitutional requirement of separation of powers by imposing mandatory sentences and thus, has invaded the powers of the Judicial Branch of the government. That contention is invalid. The legislature has the initial right to provide for sen-

tences, mandatory or otherwise, that are felt to be consistent with the nature of the crime committed. A mandatory incarceration provision does not per se violate the separation of powers, although it may restrict the sentencing discretion of the trial court.

Defendant's third assignment of error is overruled.

Defendant's assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

STRAUSBAUGH, P.J., and REILLY, J., concur.

IN THE COURT OF APPEALS OF

FRANKLIN COUNTY, OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

v. : No. 81AP-220

PHILLIP BONELLO, :

Defendant-Appellant. :

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on September 29, 1981, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

STRAUSBAUGH, P. J., REILLY & McCORMAC, JJ.

BY: _____
Judge John W. McCormac /s/

cc: Karen L. Martin
Frank A. Ray and
Eugene Weiss

Filed: September 29, 1981 at 10:58 A.M.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1982 Term

City of Columbus. To wit: March 9, 1982

State of Ohio,

Appellee, No. 82-121

vs. MOTION FOR LEAVE TO APPEAL

PHILLIP BONELLO, FROM THE COURT OF APPEALS

Appellant. FOR FRANKLIN COUNTY

It is ordered by the Court that this motion is overruled.

ARROWHEAD LEGAL

CERTIFICATE OF SERVICE

This will hereby certify that all parties to be served have been served. The Office of the Prosecuting Attorney for Franklin County, Ohio was served with the re-printed Petition for Certiorari by hand delivery this 3d day of June, 1982.

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